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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT SENIOR JUDGE

OCTOBER 7, 2022

12:32 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; October 7, 2022.)

THE COURT: Good afternoon. This is Judge Totenberg. I'm conducting a trial right now. So I've got this 25 minutes and not more. So just keep that in mind.

We're here in Curling v. Raffensperger, 1:17-CV-2989, first and foremost to discuss the issue of the documents in the privilege log. And maybe there is some confusion. But I did not see that there was -- that the State had provided from a representative officer of the State department or the board any type of affidavit asserting the privilege.

Now, I know that the plaintiffs have asked that I basically strike the assertion of privilege on that ground. But I'm not going to. But I do think that somebody who has operational authority who has reviewed the assertion of privilege in these matters and not just counsel needs to submit an affidavit that is appropriate consistent with the legal authority that we have previously discussed and -- and to do that by Monday morning.

Even though the court is closed, I will be able to review it if you put it on the docket. And whatever you file will still be on the docket, even if I can't file things on the docket without anyone here.

So that is my expectation. I don't think it has to be Mr. Raffensperger himself. But somebody of comparable

1 authority on a programmatic basis who is speaking on behalf of
2 the State department and the board.

3 MR. TYSON: Your Honor, this is Bryan Tyson. If I
4 could just ask kind of along the lines if it is comparable to
5 Mr. Raffensperger are you anticipating somebody like the Deputy
6 Secretary of State, Mr. Sterling, or would the Director of
7 Investigations, who is a law enforcement officer, Ms. Koth, be
8 sufficient?

9 I just want to make sure we're giving you what you
10 are asking for.

11 THE COURT: Tell me is he -- the director you're
12 talking about, is he within the State -- is he the director
13 within the Secretary of State's office?

14 MR. TYSON: Yes, Your Honor. Bryan Tyson. Sara
15 Koth, she is the director of the -- the chief investigator over
16 the Investigations Division of the Secretary's office and a
17 POST certified law enforcement officer.

18 I believe, Your Honor, we did something similar with
19 Judge Jones in the Fair Fight case when Frances Watson was
20 formerly the chief investigator. So I think that is going to
21 be some precedent for us using the director -- the chief
22 investigator as the individual.

23 THE COURT: And would she have knowledge about the
24 information in this log?

25 MR. TYSON: She would, Your Honor. She prepared the

1 documents, and we got the documents from her and her file over
2 which the investigative privilege is asserted on that log.

3 THE COURT: Okay. That is satisfactory then.

4 MR. TYSON: Thank you.

5 THE COURT: I did have some questions regarding the
6 log that have nothing to do with the -- in really trying to
7 narrow down what is likely truly at issue. I mean, there are a
8 number of communications that seem to be essentially with
9 counsel and are attorney-client work product that I don't
10 imagine that I would consider appropriate for disclosure.

11 And if the plaintiffs are contending otherwise, if
12 you would briefly tell me why. What would be the basis of
13 piercing attorney-client and work product privilege?

14 MR. CROSS: Your Honor, this is David Cross. We're
15 not. The only entries that we're addressing are the ones that
16 are investigative privilege. Everything that is
17 attorney-client and work product, that is not an issue that
18 we're raising at this time. And I don't have any reason to
19 anticipate that we will.

20 THE COURT: Okay.

21 MR. CROSS: One issue that we did have, Your Honor,
22 because the log on the descriptions is not very specific. So,
23 for example, one of the entries just says Coffee County
24 documents. Another says Coffee County -- literally just says
25 Coffee County.

1 To the extent that the declaration is coming in on
2 Monday, we would ask consistent with the case law that it be
3 specific about -- I mean, obviously we don't expect it to
4 disclose the substance, because that is what is at issue. But
5 what the courts have said is it needs to be specific enough to
6 get a better description of sort of categorially or
7 substantively what is being withheld and why that in particular
8 presents some harm to the investigation if disclosed to us,
9 particularly under the protective order where it would be
10 limited to counsel, if that is appropriate. But we would ask
11 for that.

12 MR. TYSON: Your Honor, this is Bryan Tyson. I think
13 we can include that in Ms. Koth's affidavit. Those were
14 emails. So that is the email subject line. So we can just
15 describe at a high level what the topics were. It is going to
16 be the same general topic area.

17 THE COURT: All right.

18 MR. TYSON: We can explain that.

19 THE COURT: All right. So when do you think you can
20 get that done? I mean, I would think that they need it Monday
21 morning.

22 MR. TYSON: Yes, Your Honor. This is Bryan Tyson. I
23 think we can get it for you Monday morning. Ms. Koth is at an
24 out-of-town training at the moment that she actually returns
25 from early next week. But she is available. I think we should

1 be able to get everything done with her over the weekend and --
2 so --

3 THE COURT: Okay. Well, if you can get it filed by
4 10:00 in the morning, that would be satisfactory.

5 MR. TYSON: Certainly.

6 THE COURT: I mean, if there is a genuine -- it is
7 hard for me to go further at this point with having no idea
8 what these documents are. But obviously one alternative is --
9 will be if you -- is simply to share the specific -- these very
10 limited group of documents with me for in camera review.

11 It is hard for me to really know what they are at
12 this juncture and whether it is -- you know, and obviously hard
13 for the plaintiffs as well. Because if they are just basically
14 documents that the plaintiffs already have, there is not really
15 that much of an issue.

16 I don't -- and I don't know. Do you happen to know
17 whether they are, Counsel?

18 MR. TYSON: Your Honor, this is Bryan Tyson. These
19 are not documents the plaintiffs have to my knowledge. These
20 are documents that have been indicated were shared with either
21 the Secretary's office and the investigative division or are
22 from the file -- Ms. Koth's notes kind of investigating,
23 research, you know, interview plans, those types of things that
24 are included. But we can provide them for in camera review.

25 THE COURT: All right.

1 MR. TYSON: Would you like them printed and delivered
2 to you? What is the best way to get them to you?

3 THE COURT: What is the fastest way? I mean, if you
4 can have them delivered, great. But, otherwise, you can
5 certainly electronically send them. But if you don't feel
6 comfortable doing that, then have them delivered here today.

7 MR. TYSON: Okay. We can do that, Your Honor. We'll
8 get them put together and delivered to you.

9 THE COURT: All right.

10 MR. CROSS: Your Honor, this is David Cross. One
11 point of clarification. And I may have misunderstood the log
12 when it first came in.

13 I thought the log was capturing not just documents
14 withheld but also redactions because a lot of the documents the
15 State produced on Monday have redacted portions. But looking
16 back at it again this morning, I'm not sure that is right.

17 Bryan, are you able to shed light on that? Have you
18 guys logged the redactions too? Because if not, we would ask
19 for that.

20 MR. TYSON: Certainly we haven't because we were
21 trying to work on the timeline in getting this to y'all by
22 Monday at noon. But the redactions are all attorney-client.
23 And I think that is pretty obvious from where they occur. It
24 is redacting language from outside counsel. It is redacting
25 language from the Attorney General's office in an email.

1 So every redaction that is in the file that we
2 produced is attorney-client. But we can log those if you need
3 that written down separately.

4 MR. CROSS: No. No. That is okay, Bryan. I thought
5 it might be attorney-client because you can kind of tell what
6 is there. But if it was an investigative privilege redaction,
7 we wanted that log.

8 MR. TYSON: No, there is no investigative redaction.

9 MR. CROSS: Okay. Thanks, Bryan.

10 THE COURT: Well, then basically, you know, we'll
11 look at that and get it back to everyone as soon as possible on
12 Monday.

13 Does that --

14 MR. CROSS: Your Honor, the only other thing --
15 sorry.

16 THE COURT: Yes. Go ahead.

17 MR. CROSS: I just want to make sure we are clear.
18 The State filed the most recent log last night. Our motion --
19 I guess it is a motion -- relates to the original log also that
20 we discussed in the prior conference because there was
21 investigative privilege over those prior reports.

22 So I just want to make clear that the declaration
23 that comes in on Monday is addressing both sets of documents
24 and that whatever Your Honor is looking at in camera will
25 include both sets. If it is --

1 THE COURT: This is the one with the larger print and
2 just -- Document 1504 on the docket?

3 MR. CROSS: Yes, ma'am.

4 THE COURT: Okay.

5 MR. MILLER: Your Honor, this is Carey Miller.

6 I can address that additional privilege log, which is
7 the first time we went through this exercise relative to the
8 investigative reports and summaries.

9 And as we discussed before, only one of those
10 investigative reports has anything to do with Coffee County
11 whatsoever. The final entry on the log is subject to a claim
12 of work product privilege as well, which relates to our
13 consulting experts' work on the ICC and EMS server, forensic
14 copies of which the plaintiffs already have now.

15 And with respect to the subject matter of any of the
16 other reports, as we discussed before, we did produce the
17 summaries for those subject matters. I just as an initial
18 matter fail to see the relevance of some of that.

19 MR. CROSS: Carey, could I ask -- that is really
20 helpful. So I understand, everything other than the work
21 product one, you are saying you guys personally reviewed those
22 and none of them relates to allegations of unauthorized access
23 to voting equipment or software?

24 MR. MILLER: No, that is not what I said.

25 MR. CROSS: Oh, sorry.

1 MR. MILLER: We produced investigative summaries
2 for -- that correspond to the investigative report numbers that
3 are in the entries on each of those logs. So you guys have the
4 investigative summary. So you know what the subject matter is,
5 what the general outcome is. The report is the more detailed
6 version that is subject to a claim of investigative privilege.

7 Of the entries on the log, one report pertains to
8 Coffee County. That is 2020-250, which was generated prior to
9 the Scott Hall recording and the latest allegation. The final
10 entry is the work product one. That part you were accurate on.

11 MR. CROSS: Okay. I guess we would ask that if there
12 are any reports on here -- and I haven't had the time to go
13 back to look at the summaries that were produced. But if there
14 are any reports on here that relate to allegations of
15 unauthorized access to voting software or equipment --

16 THE COURT: I don't think they were. I went through
17 them myself not last night but before. I mean, you know, they
18 are -- as I think that counsel said in our last call, they are
19 ones where people were able to obtain -- they left -- not just
20 left doors on. People were able to come in. I think in
21 Stephens County even, there was something about coming in.
22 Really just not being -- not secure practices as running the
23 office.

24 MR. MILLER: That's right, Your Honor.

25 THE COURT: Somebody else also -- you know, I think

1 there's somebody else who complained about their systems but
2 nothing about breach.

3 MR. CROSS: Okay. That is what I thought too, Your
4 Honor. So that is what I was trying to clarify.

5 THE COURT: But that is -- you know, that was -- that
6 is just my recollection.

7 But as defense counsel has said, I think you can --
8 it is Document 1449-1, if you have anyone with you who wants to
9 quickly go through them.

10 MR. CROSS: We'll do that.

11 MR. MILLER: And that's -- David, maybe it is ships
12 passing through the night --

13 COURT REPORTER: I'm sorry. I can't hear you. Mr.
14 Miller --

15 MR. MILLER: Oh, I apologize.

16 COURT REPORTER: That's okay. You were just muffled.

17 MR. MILLER: Is that any better?

18 COURT REPORTER: Maybe.

19 MR. MILLER: David, I was just going to say maybe it
20 is ships passing through the night as to the definition of
21 unauthorized access or security allegations.

22 But, you know, that was our review of the reports in
23 trying to be as inclusive as possible. But you guys have the
24 subject matter. So if there are ones of particular subject
25 matter that you do think are relevant, that could certainly be

1 helpful.

2 THE COURT: So Document 1449-1 deals with the Coffee
3 County, and it is at Page 31. And that was originally
4 identified as state education -- state board Number 2020-250.
5 So I assume this was initiated in 2020.

6 MR. MILLER: Yes, Your Honor.

7 MR. TYSON: Yes, Your Honor. Bryan Tyson. I was
8 just going to clarify because 2020-250 is the original
9 allegation. This also goes to the last entry in the privilege
10 log about the -- related to the original investigation from
11 various investigators. Those are the three allegations that
12 are in that summary of investigation about, you know, the
13 failure to certify and the things that are unrelated to the
14 allegations we learned of from Mr. Hall. So those are really
15 kind of separate from the unauthorized access issues.

16 But we didn't want to waive anything. That is why
17 those were included, but they are not related to unauthorized
18 access.

19 THE COURT: Well, obvious -- yes and no. It depends
20 on the way you see it. But it is obviously all part of the
21 same -- part of a related story. I mean, the whole thing
22 starts with the complaint one sending a letter to -- that they
23 could not certify because of the electronic recount numbers.
24 And then obviously there is further discussion later on. And
25 complaint two is comparable but -- about the vote -- the way

1 the system is working.

2 So you've given -- but you have provided the
3 plaintiffs with everything as to each one of these complaints?

4 MR. MILLER: Your Honor, I may be -- this is Carey
5 Miller. I may be misunderstanding the question there.

6 But provided everything as it relates to the
7 complaints --

8 THE COURT: Well, you completed an investigation as
9 to complaint one and two, and then I think you may have
10 reopened things.

11 But there was a completed investigation as to one and
12 two, wasn't there?

13 MR. MILLER: Yes, Your Honor. And that -- the
14 plaintiffs have the investigative summary, which, you know,
15 obviously was filed on the docket. We had already produced it
16 to them.

17 What we have withheld under a claim of investigative
18 privilege because it has not completed prosecution is the
19 investigative report.

20 THE COURT: For both complaint one and two or for --

21 MR. MILLER: It is a single -- yes, Your Honor, it is
22 a single report. But it encompasses both complaint one and
23 two.

24 THE COURT: All right. And also three or just one
25 and two?

1 MR. MILLER: Your Honor, it would also include three.

2 THE COURT: Okay. All right. Do -- is there
3 anything here on your log that relates to Spalding County?

4 MR. TYSON: Your Honor, this is Bryan Tyson. There
5 is not anything for Spalding. We turned over to the plaintiffs
6 all the documents we had so far for Spalding. So there is
7 nothing further on that. That investigation is just getting
8 underway.

9 THE COURT: Okay. Does that address the plaintiffs'
10 concerns? I mean, I will look at this on late -- sometime
11 Monday morning. Late morning probably.

12 And if necessary, can I reach you-all? I mean,
13 otherwise, we'll just send it by -- disposition by email.

14 MR. CROSS: Yes, Your Honor. For plaintiffs, yes.

15 MR. TYSON: And the State is certainly available as
16 well. This is Bryan Tyson.

17 THE COURT: All right. Well, it is sort of -- I'm
18 just sort of being very -- a little somewhat oblique because I
19 don't know what we're going to be seeing.

20 So -- all right. Well, if we reach you, it probably
21 will be -- try to be in the afternoon but not too late. And if
22 we do, I might just ask you to -- one of you to set up the
23 phone call because I'm not going to be in the office. But
24 we'll let you know at that juncture.

25 The other issue that was raised sort of on an

1 emergency basis was that of -- on behalf of the Coalition last
2 night as to AEO documents and the need for the client
3 representative for the Coalition to have -- be able to properly
4 assist her counsel in representing them and be able to have
5 access to some of these documents.

6 And, you know, I don't know what has been classified
7 as AEO so that is -- other than the Curling report, the one of
8 Dr. Halderman.

9 But I have no other idea what has been classified.
10 And I know that counsel just sort of as an immediate thing says
11 I'm not going to look -- obviously I don't have the defendants'
12 response. But I can understand why they -- counsel would like
13 Ms. Marks at the deposition because she's obviously played a
14 vital role in their own evaluation of what is going on in --
15 not just in Coffee County but obviously for a longer period of
16 time.

17 But I don't know what is in these AEO documents. And
18 I don't know whether they are ones that would seem to me that
19 Ms. Marks is so deeply involved -- has been so deeply involved
20 in the Coffee County matters that it is hard for me to know --
21 to think that there was something she hadn't already seen
22 herself through plaintiffs' discovery.

23 But maybe there is something and that plaintiffs are
24 in a position to identify that for me so that I could
25 understand is it vital to her being able to be -- have read it

1 and been prepared in order to be at the hearing.

2 I realize that the plaintiffs are looking for broader
3 assistance and involvement and her ability to access other
4 information. But I'm just trying because of the time
5 sensitivity to deal with the issue of what is needed if she
6 were to be by counsel's side on Tuesday.

7 MR. BROWN: Your Honor, this is Bruce Brown. We --
8 you are correct that we're seeking broader relief with respect
9 to Ms. Marks in connection with attorneys' eyes only documents.

10 We will be making a separate motion today, probably
11 within the hour, to declassify or redesignate the documents
12 that the State has asserted AEO with respect to the last batch.
13 So it is a much more concrete motion to you.

14 We have conferred with the State counsel about it.
15 We haven't been able to reach an agreement. Although they did
16 declassify some documents.

17 So that is coming to you. And that will explain in a
18 more concrete way a narrower request. That doesn't overtake
19 the earlier motion that we filed yesterday but hopefully will
20 be more concrete for you to evaluate.

21 THE COURT: All right. Well, assuming we talk on
22 Monday, I will have read that as well.

23 MR. MILLER: Your Honor, if I may, this is Carey
24 Miller. And just so that we're on the same page, it may cut to
25 the chase here a little bit.

1 But, Bruce, do I understand that part of your motion
2 includes also access to the forensic images of the server and
3 ICC, or am I incorrect in that?

4 MR. BROWN: It does not. Those are not AEO. But it
5 does not.

6 MR. MILLER: I disagree on that point. I think --

7 MR. BROWN: They might be confidential. But in any
8 event, it doesn't cover that.

9 MR. MILLER: Well, I appreciate it doesn't cover
10 that. But I do want to clarify. I understood -- I thought it
11 was in an order that it was produced as attorneys' eyes only.

12 MR. BROWN: It could be. If you are -- which one are
13 you talking about?

14 MR. MILLER: I'm talking about the forensic images of
15 the ICC and of the EMS server that Judge Totenberg ordered us
16 to produce.

17 MR. BROWN: Right. I understand. No.

18 MR. MILLER: I understood those were attorneys' eyes
19 only. I just want to make sure we're on the same page on that.

20 MR. BROWN: No. My motion that I'm filing shortly
21 has only to do with the documents that you designated AEO. I
22 know you withdrew some of the ones that were emails to the
23 Washington Post from AEO classification, but there are still
24 ones that we think are overdesignated, and it will address
25 documents only.

1 MR. MILLER: Okay. Sure, I get that with respect to
2 the motion.

3 I guess the bigger question now is I want to make
4 sure we're on the same page that the forensic images are being
5 treated as attorneys' eyes only.

6 MR. BROWN: Yes, they are.

7 THE COURT: And I understood that as well from our
8 in-person conference.

9 All right. Well, I will look at that, and I'm just
10 going to take a small bite at this point to deal with your
11 request as to her being able to be next to counsel on Tuesday.

12 And, you know, of course, there are -- if there is
13 something that is confidential, she can always be excused
14 during a period of time. That is not what your desire is. But
15 if it is necessary, that is -- that is an option. Okay.

16 MR. CROSS: Your Honor, this is David Cross. I know
17 you need to go.

18 But just to give you a quick update, we're still
19 waiting for search results from Ms. Latham. Our understanding
20 is those searches have been running this week. It is taking a
21 little longer than we thought it would. But we are in
22 discussions with her counsel, Holly Pierson. And we understand
23 we should get a search report today or tomorrow morning. And
24 hopefully documents will roll in from there. So just as an
25 update.

1 THE COURT: All right. My law clerks point out to me
2 that they believe that the deposition -- I'm wrong. The
3 deposition is on Wednesday and not Tuesday. And I think that
4 is my muddled brain. Last week it was -- this past week it was
5 supposed to be Tuesday.

6 But now it is going to be Wednesday?

7 MR. CROSS: That's correct, Your Honor. Although I
8 was panicking myself that you were right and I was wrong.

9 THE COURT: All right. So -- anyway. Well, that
10 gives us a little more breathing room.

11 Okay. Good. That is fine. We'll let you know
12 whether we're going to have to push off until Tuesday morning
13 or something because I'm impinging on everyone else's time off.

14 But all right. I want to say so there is no
15 expectations otherwise: The position I took when I denied
16 Dominion's motion before is -- I am very firm about so no one
17 has any conceptions otherwise. I'll revisit this when the
18 election cycle is completely over.

19 MR. CROSS: Your Honor, this is David. Just to
20 clarify, you are going to revisit the pending issue before you
21 on the MITRE report and the Halderman report?

22 THE COURT: I mean, I indicated I would -- I would --
23 you know, I would look at where we are but after the election
24 cycle.

25 MR. CROSS: Understood. I just wanted to make sure

1 that I understood what you meant by the Dominion issue. But
2 understood. Thank you for that.

3 THE COURT: All right. So no one should, you know,
4 think that they need to rush to the issue is the real point
5 because I'm firm of my view at this point.

6 All right. Thank you very much. I do need to go
7 back into court. Have a very good weekend. Thanks.

8 MR. CROSS: Thank you, Your Honor.

9 THE COURT: All right. Bye-bye.

10 (The proceedings were thereby concluded at 1:02
11 PM.)

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 21 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 7th day of October, 2022.



SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT